

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 12, 2006 Session

**COMPOZIT CONSTRUCTION CORPORATION v. J. B. GIBBS  
& SON CONSTRUCTION CO., INC.**

**Appeal from the Circuit Court for Davidson County  
No. 05C-2394     Marietta M. Shipley, Judge**

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**No. M2006-00329-COA-R3-CV - Filed on October 27, 2006**

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Plaintiff appeals the trial court's ruling that for purposes of the statute of limitations, plaintiff knew or should have known the identity of the tortfeasor earlier. We affirm the dismissal of the lawsuit as time barred.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Don L. Smith, S. Joe Welborn, Nashville, Tennessee, for the appellant, Compozit Construction Corporation.

Harry W. Miller, III, Madison, Tennessee, for the appellee, J. B. Gibbs & Son Construction Company, Inc.

**OPINION**

This matter is before us on the question of when the three (3) year statute of limitations in Tenn. Code Ann. § 28-3-105 began to run on the tort claim of Compozit Construction Corporation ("Compozit") against J. B. Gibbs & Son Construction Company, Inc. ("Gibbs"). This case originated in the general sessions court and was appealed to circuit court. The parties agreed that the statute of limitations issue would be presented to the trial court to decide based on the testimony taken in the general sessions court and the Statements of Undisputed Fact. After reviewing that evidence, the circuit court determined that the action was barred. Plaintiff appeals.

The parties do not dispute the basic facts relevant to the statute of limitations issue. The parties do disagree, however, on when the limitations period began to run under these facts. Compozit entered into a contract with the surety in February 2000 to complete the Deer Run

subdivision. The original contractor had left the project. Some of the work had already been done by the original contractor, including installation of the underground water lines. Due to permit related issues, Compozit was not on the subdivision site for a period of time. During the period Compozit was not yet on site, Nashville Gas hired Gibbs to install gas lines in the subdivision. On December 1, 2000, one of the partners in Compozit, Kevin Carr, and the President of Gibbs, Randall Tresner, participated in a meeting about the gas lines for the Deer Run project. Thereafter, during the time when Gibbs was on site but Compozit was not, Gibbs contacted Compozit to alert them to a broken water pipe it had discovered. This contact was made, according to Gibbs, so that Compozit would not blame Gibbs for the leak.

In a separate incident, Gibbs accidentally cut the water line at a point where the underground gas lines being installed by Gibbs intersected with an existing water pipe. It is undisputed that this happened on December 8, 2000 and that Gibbs fixed this cut water line without telling Compozit of the problem.

Although the water lines had been tested and approved before Compozit was hired to complete the project, Compozit was asked by Metro Water Service to test the line again when the project was near completion. The second pressure test of the water line indicated leaks existed in the line. After investigating in June and July of 2001, Compozit discovered two leaks in the water line in July of 2001. One of the leaks was located where Gibbs tried to fix the cut to the water line. Compozit repaired the leak and completed the project. Later, in December of 2001, in order to identify who damaged the water line, Compozit contacted Nashville Gas to find out the identity of the gas line contractor. A representative of Nashville Gas identified Gibbs as the gas contractor.

In September of 2004, Compozit sued Gibbs in general sessions court to recover approximately \$11,500, the cost of repair to the water line. In the general sessions court and on appeal to the circuit court, Gibbs argued that Compozit's cause of action accrued in July of 2001 when the leak was discovered, and the three (3) year limitations period barred Compozit's action. Compozit argued, on the other hand, the period did not begin until Compozit identified the tortfeasor, Gibbs, in December of 2001, so the action was brought within the applicable three (3) year period.

At oral argument, both parties agreed that since the court decided the issue by consent based on testimony, although the motion was cast in terms of a summary judgment, the matter was actually submitted to the trial court to determine the facts. Therefore, we review this case *de novo* on the record with a presumption of correctness of the trial court's findings of fact, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999).

The standard that is applicable to determine when the statute of limitations begins to run for a tort was discussed in *Foster v. Harris*, 633 S.W.2d 304 (1982). In *Foster*, the Supreme Court reiterated the principle that a cause of action in tort is non-existent until a judicial remedy is available to the plaintiff. *Id.* at 305. In order for a judicial remedy to be available, there must be a breach of

some legally recognized duty that causes legally cognizable damage. *Id.* Continuing that sequence of logic:

It is axiomatic that no judicial remedy was available to this plaintiff until he discovered, or reasonably should have discovered, (1) the occasion, the manner and means by which a breach of duty occurred that produced his injury; and (2) the identity of the defendant who breached the duty.

*Id.* See *Terry v. Niblack*, 979 S.W.2d 583, 586 (Tenn. 1998); *Wyatt v. A-Best, Company, Inc.*, 910 S.W.2d 851, 855 (Tenn. 1996).

Whether a plaintiff has acted reasonably to discover the injury or wrong is a question for the trier of fact to determine. *Wyatt*, 910 S.W.2d at 854-55; *Sutton v. Barnes*, 78 S.W.3d 908, 913 (Tenn. Ct. App. 2002). Likewise, we believe it is for the trier of fact to determine if plaintiff has acted reasonably in determining the identity of the tortfeasor.

We cannot find that the evidence preponderates against the trial court's findings that a reasonable person would have quickly inquired about who cut the line. Compozit knew or should have known that Gibbs committed the tort at or about the time Compozit discovered the leak in July of 2001. Compozit knew of the damage in July of 2001. At the time Compozit discovered the damage, Compozit already knew Gibbs was the contractor installing the gas line. Compozit knew this because Gibbs had already met with Compozit about this project and Gibbs had called Compozit about another problem on the project. Compozit knew the broken water line was located where it intersected the gas line. The gas and water line were both underground which eliminates other possible causes. In Plaintiff's Response to Defendant's Statement of Undisputed Facts, Compozit agreed that "the person who installed the gas pipelines was probably the person who cut the water main." The testimony shows that Compozit knew of all these facts in July of 2001. It stands to reason that Compozit knew or should have known that Gibbs was the tortfeasor in July of 2001. Although Compozit called Nashville Gas in December of 2001 to identify the gas contractor, this does not detract from the fact Compozit already had actual knowledge the gas contractor was Gibbs. As found by the trial court, even if Compozit did not know Gibbs was the gas contractor, a reasonable person under these facts would quickly inquire. We find the conclusion of the trial court wholly supported by the record and affirm.

Costs of this appeal are taxed to Compozit Construction for which execution may issue if necessary.

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PATRICIA J. COTTRELL, JUDGE